Supreme Court, U.S.
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In the Supreme Court of the United States

Harry Lee,
Petitioner,

vs.

Cecil McKenzie,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May a white sheriff's deputy prevail on a race-based employment discrimination claim under 42 U.S.C. §§ 1981 and 1983 on the theory that he was fired by the Sheriff, his employer, to placate the Sheriff's African-American political constituents, where there is no evidence of race-based disparate treatment among the Sheriff's employees?

May the Fifth Circuit U.S. Court of Appeals, when issuing a decision on panel rehearing, recant its original finding that there is "no evidence" to support the trial court's judgment in favor of Cecil McKenzie without indicating what evidence in the record now supports Cecil McKenzie's claim, and does the failure to refer to any evidence of record in the decision on panel rehearing frustrate additional appellate review?

STATEMENT PURSUANT TO RULES 14 AND 29.6

In accordance with Rule 14, Petitioner submits that the caption to the petition identifies all parties to the proceeding in the court whose judgment is sought to be reviewed; however, caution prompts Petitioner to list them below and to provide the names of counsel to these parties.

1. Harry Lee, Sheriff of Jefferson Parish, Defendant-Appellant- Petitioner.

2. Cecil McKenzie, Plaintiff-Appellee-Respondent.

3. Daniel R. Martiny and Franz L. Zibilich, of Martiny & Caracci, Metairie, Louisiana, counsel to Sheriff Harry Lee.

4. Audrey N. Browne, Jeffrey A. Schwartz, Schwartz and Browne, Suite 2635, 650 Poydras Street, New Orleans, Louisiana, 70130, counsel Cecil McKenzie.

In accordance with Rule 29.6, Petitioner submits that there are no corporations or publicly held companies involved in this action.

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IN THE
UNITED STATES SUPREME COURT

October Term, 2001

No.

Harry Lee, Petitioner,

vs.

Cecil McKenzie, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Sheriff Harry Lee respectfully submits this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The original panel opinion of the United States Fifth Circuit Court of Appeals (App. A.) is reported at 246 F.3d 494 (5th Cir. 2001). The Opinion on Panel Rehearing of the United States Fifth Circuit Court of Appeals (App. B) is reported at 259 F.3d 372 (U.S. 5th Cir. 2001). The August 15, 2001 order of the United States Court of Appeals for the Fifth Circuit denying en banc review (App. C) is unreported. The January 20, 2000 decision of the United States District Court for the Eastern District of Louisiana (Rec. 606) is unreported.

JURISDICTION

The Original Panel Opinion was issued on April 5, 2001. The Opinion on Panel Rehearing of the U.S. Fifth Circuit Court of Appeals was issued on July 20, 2001. The decision of the U.S. Fifth Circuit Court of Appeals, denying en banc review, was issued on August 15, 2001. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved:

42 U.S.C. § 1981, which provides:

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by non-

governmental discrimination and impairment under color of State law.

42 U.S.C. §1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

History of the Litigation

Cecil McKenzie won this case on the theory that he was a white sacrificial offering by Sheriff Harry Lee to the African-American community of Jefferson Parish. Cecil McKenzie was fired after he straddled his hefty body across a scrawny African American teenager, after the young suspect was shot by police, hand cuffed, and stretched flat on his back. Cecil McKenzie claimed that his discharge was

prompted by Sheriff Lee's desire to quell dissent and curry favor among his African-American constituents, and said so in the federal civil rights action he filed in April of 1995:

> Plaintiff alleges that he was terminated because, at the time of his termination, [Sheriff] Harry Lee and the JPSO [Jefferson Parish Sheriffs Office] were under *considerable pressure from the African American Community* as a result of several incidents in which white JPSO deputies were accused of using excessive force towards members of that community.

(Rec. 301)(emphasis added) Mr. McKenzie also claimed that black deputies were not fired for conduct similar to his own. (Rec. 301)

The original complaint named as defendants Sheriff Harry Lee and the Jefferson Parish Sheriff's Office, an entity that lacks the legal capacity to sue and be sued. (Rec. 297) Mr. McKenzie claimed that he lost his job as a Jefferson Parish Sheriff's Deputy because he is Caucasian (hereafter "white"), and alleged that Sheriff Lee committed impermissible racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983.

Mr. McKenzie enjoyed *three trials* on his claims. The first proceeding resulted in a mistrial, due to unconstitutional and racially-biased jury-picking tactics by Cecil McKenzie's counsel. (Rec. 565, 388, 330) At the close of the second trial, the jury could not reach a verdict and the district court judge declared a mistrial. (Rec. 373)

The third and final trial of Cecil McKenzie's claims began on November 1, 1999 (Rec. 330), resulting in the judgment of November 3, 1999. (Rec. 305) That judgment awarded Mr. McKenzie $64,000.00 in damages, along with costs and "pre-judgment interest." (Rec. 305) Defendant Lee filed a motion to alter or to amend that judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Rec. 658) The trial court denied the Rule 59 motion on January 20, 2000. (Rec. 606) Sheriff Lee filed his notice of appeal on February 14, 2000. (Rec. 603)

The Court of Appeals ruled in Sheriff Lee's favor on April 5, 2001, declaring that Cecil McKenzie presented "***no evidence that he was terminated due to his race,*** and no evidence that the proffered nondiscriminatory reason for his termination was merely a pretext for racial discrimination." (App. A)(emphasis added) The panel also declared that the Sheriff "provided ***unrebutted testimony*** that he fired numerous black and white officers for disciplinary violations, including the use of excessive force." (App. A.) (emphasis added) Finally, the panel declared that Cecil McKenzie presented evidence that "can only support the contention that McKenzie was punished because of the race of his victim, rather than his own Caucasian identity." (App. A)

Cecil McKenzie sought review en banc. Treating the petition for review en banc as a petition for panel rehearing, the Fifth Circuit reversed course in its opinion of July 20, 2001, which declared that Cecil McKenzie "has presented some, albeit minimal, evidence of treatment different from similarly situated non-members of his protected class."

(App. B) On rehearing, the panel did not identify what this "minimal" evidence might be, by contrast to the original panel opinion's specific evaluation of the evidence presented, and by contrast to the original panel opinion's conclusion that the evidence pointed only to the race of Cecil McKenzie's victim as the motivating factor behind the deputy's dismissal.

Statement of Fact

Cecil McKenzie lost his job with the Jefferson Parish Sheriff's Office after he threatened a teenager about half his size, a teenager who was already in hand cuffs, flipped on his back in the street, with a wound from a policeman's bullet in his leg. The incident that cost Cecil McKenzie his job happened before dawn on April 13, 1994. (Tr. 27, McKenzie)[1] That night, Mr. McKenzie and a squadron of other deputies responded to a report of a car jacking at a gas station near the Westbank Expressway across the river from New Orleans, Louisiana. Police hit speeds of more than 100 miles per hour during the chase. (Tr. 28, McKenzie)

Some five or six police cars finally cornered the alleged car jacker. A shot rang out from another police unit the instant the suspect emerged from his car. The youngster stumbled and hit the pavement — he was hit in the leg. (Tr. 29, McKenzie)

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[1] References to the trial transcript appear as "Tr.", while references to the record appear as "Rec." References to an Appendix appear as "App.," followed by the appropriate designation.

Mr. McKenzie ran up to the suspect. He tried to handcuff the suspect, striking the teenager with his flashlight. (Tr. 29, McKenzie) After the hand cuffs were secure, Cecil McKenzie rolled the injured suspect over onto his back. As Mr. McKenzie described it: "we rolled him over, he looks up at me with these big old eyes, *I mean he's this little bitty small guy and he's got these big old saucer eyes.*" (Tr. 30, McKenzie)(emphasis added) The youngster was unarmed. (Tr. 30, McKenzie)

After this "little bitty small guy" was in custody and in handcuffs, Cecil McKenzie lost control. In his own words, this is what Cecil McKenzie said he did:

> And having my flashlight in my hand, I placed it to his throat and I told him, I said, "You stole this car. You beat this woman and you almost killed us. What do you think we're arresting you for?

(Tr. 30, McKenzie) Cecil hit the injured youngster. JPSO Sergeant Lisa Lunsford rushed over.(Tr. 8, Lunsford)

"So, you like to hit women. "Cecil said to the suspect stretched out on the pavement. (Tr. 7 Lunsford) Lunsford screamed at Cecil McKenzie, she told him to stop, to back off. (Tr. 8 Lunsford) During the incident, the suspect was in handcuffs, on his back, with a gunshot wound in his right leg.

Officers summoned an ambulance, and Mr. McKenzie went with the suspect to the hospital. (Tr. 31, McKenzie) Lunsford told McKenzie there on the scene that she would file a disciplinary report. (Tr. 10, Lunsford)

Lunsford issued her disciplinary report regarding Mr. McKenzie's behavior. She risked — and suffered — a frosty response from her colleagues. (Tr. 11, Lunsford) She recommended a two-day suspension. Tr. 14, Lunsford) Cecil McKenzie had been suspended twice before. (Rec. 298)

A criminal investigation followed, during which Cecil McKenzie was suspended from duty. (Tr.30, Lunsford) Craig Taffaro, Westbank Operations Commander for the JPSO, recommended that Cecil McKenzie be fired.(Tr. 42, Taffaro) Why? The commander explained at trial:

> [T]he person that was hand cuffed was struck and I had issues that it was a battery, number one. Number two, Sergeant Lunsford witnessed the thing and I believe that the incident did occur. *I had negative [negligent] retention factors to consider and vicarious liability issues.*

(Tr. 44, Taffaro)(emphasis added)

The Sheriff, who had the final say regarding Mr. McKenzie's termination, testified at trial that the former deputy's skin color didn't enter the picture, that he didn't even recognize Cecil McKenzie when he attended a deposition in this case. (Tr. 80, Lee) Cecil McKenzie was fired on May 12, 1994. (Ex. P-5)

REASONS FOR GRANTING THE WRIT

I. The decision on rehearing of the Court of Appeals impermissibly expands the scope of race-based

employment discrimination claims by dispensing with the requirement that an aggrieved worker demonstrate disparate treatment from his colleagues based on his race.

With its terse decision on panel rehearing, the U.S. Court of Appeals for the Fifth Circuit has rewritten the law governing claims of race-based employment discrimination. The Court of Appeals has dispensed with the requirement that an employment discrimination plaintiff prove that he or she suffered disparate treatment, when measured against similarly situated colleagues who do not share the claimant's race. The case calls for an "exercise of this Court's supervisory powers" because the U.S. Fifth Circuit has "so far departed from the accepted and usual course of judicial proceedings." Sup. Ct. Rule 10(a).

Review is also warranted because the Court of Appeals "has decided an important question of federal law that has not, but should be, settled by this court." The Court of Appeals has decided the critical question of whether an employment discrimination plaintiff need not prove that he suffered race-based disparate treatment, compared with his colleagues, simply by showing that his dismissal may have occurred in an atmosphere electrified by racial tension. The Fifth Circuit declared unequivocally in its panel decision of April 2001 that there was "no evidence" of disparate treatment (based on race) among Mr. McKenzie and his colleagues at the Sheriff's Office, and pointed to the "unrebutted" testimony of Sheriff Lee on this score. (App. A.)

This is the pivotal declaration in the Court of Appeals' original decision in April 2001, and the italicized emphasis in the text was supplied by the author of the opinion: "What McKenzie has failed to produce is any evidence that he was punished more harshly and that he received disparate treatment *because of his race.* " (App. A)(emphasis in original). Adopting the plain error standard of review, the Court of Appeals' April 2001 decision reversed the trial court on the basis that there was not a scrap of evidence to support the judgment.

On rehearing, the Fifth Circuit recanted these specific findings without pointing to any place in the trial record that would indicate where the original panel decision 0000 went astray. (App. B) There is no specific mention of the place in the record where the "minimal" evidence of discrimination resides. This tactic impermissibly frustrates additional appellate review.

The question of *whether Cecil McKenzie should have been fired* is separate from the question of *whether Cecil McKenzie was fired because he is white.* Was Cecil McKenzie fired because he is white or because the victim of his abuse is black? Unless Cecil McKenzie proved that he was fired because he is white, the judgments of the Court of Appeals and the trial court cannot stand.

Without any evidence in the record to show that Mr. McKenzie was fired because of the color of his own skin, neither the jury, nor the trial court, nor the Court of Appeals could conclude that Sheriff Lee engaged in impermissible employment discrimination based on race. The Court of

Appeals' April 2001 opinion did recognize that a finding of discrimination was impossible due to an abject absence of evidence of record. On rehearing, the Court of Appeals failed to point to the place in the record where the phantom evidence of disparate treatment resides.

Here is what the Court of Appeals had to say in its original panel decision about the theory of employment discrimination advanced by Cecil McKenzie, namely, that he was offered as a sacrifice to the black citizens of Jefferson Parish:

> McKenzie's burden was to establish that he was terminated on account of his race. *Byers*, 209 F.3d at 425-426. He cannot prevail by merely showing that he was punished severely, that he was punished more severely than other officers, or that he was punished because of the Sheriff's desire to gain favor in the black community.

(App. A. at 9) Turning to the trial record, the Court of Appeals declared exactly why Cecil McKenzie's race discrimination claim failed:

> With no evidence that he was terminated due to his race, and no evidence that the proffered nondiscriminatory reason for his termination was merely a pretext for racial discrimination, McKenzie's claim fails.

(App. A. at 9).

As for the specific evidentiary failings of McKenzie's case, the Court of Appeals' original panel decision points out this fatal defect: "There is no indication that the other officers who were disciplined less severely are non-Caucasians." (App. A. at 8) Then there was the fact that "Sheriff Lee even provided *unrebutted* testimony that he fired numerous black and white officers for disciplinary violations, including the use of excessive force." (App. A at 8)(emphasis added).

The Court of Appeals did not provide the record citation to the Sheriff *s unrebutted* testimony, but here is the relevant passage from the trial transcript, where Sheriff Lee summarized the firing decisions he's had to make since 1980:

Q. Now, have you caused other individuals to lose their job, because of what you believe to be inappropriate police actions?

A. Yes, many of them.

Q. Many? Like how many?

A. I would think 20 or 30.

Q. Have they been all races?

A. No—well, I think, everybody has a race.

Q. Okay. Have there been other whites, other than Mr. McKenzie?

A. Other whites?

Q. Uh-huh.

A. Yes, many.

Q. Have there been other blacks?

A. Yes, many.

Q Okay. Have you had to fire friends before?

A. I had to fire my chief deputy.

* * *

A. Right about the same time of McKenzie's termination, I terminated a black deputy, who was the son of a good fiiend of mine.

Q. And, the good friend was also a political supporter, was he not?

A. He was one of the first political supporters, when I ran in 1979.

(Tr. 70, Lee.) It was evidence like this that prompted the Court of Appeals, in its original panel decision, to reverse the judgment below under the stringent plain error standard of review. (App. A at 7)

Then there is the Court of Appeals' decision on

panel rehearing, issued July 20, 2001. Having withdrawn its more exhaustive ruling, previously reported at 246 F.3d 494, the Court of Appeals substituted a four-paragraph decision, now reported at 259 F.3d 372. This is the seminal excerpt from the Court of Appeals' finding on rehearing:

> McKenzie has presented, some, albeit minimal, evidence of treatment different from similarly situated non-members of his protected class. *See Williams v. Trader Pub.* Co., 218 F. 3d 481, 484 (5th Cir. 2000)(holding that such circumstantial evidence may be used to prove discrimination). He has therefore met the plain error requirement of presenting *any* evidence supporting his claim.

(App. B. at 3) Yet there remains in the record Sheriff Lee's "unrebutted" testimony that non-members of McKenzie's protected class were treated no less harshly.

One can only surmise, from the Court of Appeals' ruling on rehearing, that the supposed "circumstantial evidence" mentioned in the parenthetical attached to the *Williams* citation refers to Cecil McKenzie's theory that he was fired for political reasons — the race of the victim of his abuse — rather than on account of his own race. As the Court of Appeals pointedly noted in its April 2001 original panel decision, there was no evidence of disparate treatment among officers based on race, and the Sheriff offered *unrebutted testimony* that members of all protected classes received comparable discipline. The only possible evidentiary basis for the Court of Appeals' ruling on panel rehearing is the evidence regarding the political climate at

the time of Cecil McKenzie's discharge, the allegation that the Sheriff was trying to appease his African-American constituents, and McKenzie's argument that the Sheriff wanted to quell dissent among members of this community who were outraged at the use of excessive force against a minority suspect. The Court of Appeals' apparent acceptance of this theory represents an impermissible expansion of the law governing race-based employment discrimination claims.

Thus the only possible evidentiary underpinning for the panel's decision on rehearing is that Cecil McKenzie was not fired on account of his race (white), but because the teenager he bullied is black, and that the incident was a racially incendiary one for the Sheriff. This novel theory has no place in the law of employment discrimination, which requires that there be proof of disparate treatment among similarly situated employees inside and outside of the protected class. By accepting this grade of circumstantial evidence, the Court of Appeals has rewritten employment discrimination law in disputes about race, and has relieved plaintiffs of their legal obligation to prove that they suffered disparate treatment on account of membership in a protected class.

The Court of Appeals' decision on rehearing flouts the most rudimentary principles governing race-based employment discrimination claims. Cecil McKenzie predicated his federal employment discrimination claims upon 42 U.S.C. §§1981 and 1983. The legal analysis for these claims is the same as that for a claim brought under Title VII: "Claims of racial discrimination brought under § 1981

are governed by the same evidentiary framework applicable to claims of employment discrimination brought under Title VII." *Harrington v. Harris,* 118 F.3d 359, 367 (5th Cir. 1997).

The respective burdens of proof on the parties follows this Court's formula set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). As required by the 1973 decision, the plaintiff must first put on a *prima facie* case; then the defendant then has a burden of production to offer a legitimate, nondiscriminatory reason for the job action.

Yet Cecil McKenzie always retained the ultimate burden of proving that he lost his job solely because he is white, and that the Sheriff acted out of animus against Cecil McKenzie's race, rather than any political objective. "It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of production to the defendant, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' " *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 507 (1993)(emphasis in original).

Sheriff Lee fired Cecil McKenzie for his inappropriate conduct and use of excessive force against a scrawny teenager, who was in handcuffs and flat on his back on the street with a wound from a deputy's bullet in his leg. The decision of the Court of Appeals on rehearing punishes the Sheriff for purging the department of police who step seriously out of line. At trial, Cecil McKenzie' job was to prove

both that his reason was false and that the fact that he is white was the true motivation behind his dismissal. "A reason cannot be proved to be a 'pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." St. *Mary's Honor Center v. Hicks,* 509 U.S. at 515 (emphasis in original).

Nor is the Fifth Circuit's turnabout on rehearing justified by this Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). True, *Reeves* provides that a court *may, but is not compelled* to conclude that there was discrimination where a plaintiff has met his burden of establishing a prima facie case *and* has proven that the employer's reason for the action was false. Yet simple falsity of the employers supposed reason for the adverse action does not always equal discrimination:

> For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. at 148.

One can not imagine a more nondiscriminatory reason for dismissing a deputy than his use of excessive force. Whether Cecil McKenzie lost his job on account of the race

of the victim of his bullying is different from whether he lost his job on account of his own race. He failed to prove that it was his race — as opposed to that of his victim — that prompted his discharge.

The Court of Appeals has now sent a signal to Sheriffs everywhere that they face legal liability when they try to clean up their departments, when they are responsive to community concerns. Should Sheriff Lee have waited until Cecil McKenzie lost his temper again, this time with a gun in his hand? At trial, Cecil McKenzie read from his previous testimony:

> I did not feel very much remorse for the incident, but at this time I'm sorry it happened. It happened. If the same situation was [sic] all over again, it could very well happen again under the exact same circumstances.

(Tr. 65, McKenzie)

As the case now stands, Sheriff Lee owes this man a check for tens of thousands of dollars.

II. The decision on rehearing by the Court of Appeals impermissibly frustrates additional appellate review: the Court of Appeals recanted its original finding that there is "no evidence" in the record to support Cecil McKenzie's discrimination claim without pointing to any evidence in the record that would actually support a finding of race-based employment discrimination.

On rehearing, the Court of Appeals declined to indicate what, if any, evidence in the record met the "any" evidence quantum necessary to save the judgment, when scrutinized under the plain error standard of review. By contrast, the April 2001 panel decision explicitly states what essential evidence was absolutely missing from the trial record, and points to the Sheriffs unrebutted evidence that there was no disparate treatment of deputies based on race.

The Court of Appeals' sketchy decision on rehearing frustrates further appellate review. The opinion on panel rehearing demonstrates that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory power." Sup. Ct. Rule 10(a).

How did "no evidence" of disparate treatment mutate into "some, albeit minimal, evidence" of discrim-ination? How did the record mutate between April 2001, when the Court of Appeals declared that there was "no evidence" of discrimination, and July 2001, when the Court of Appeals discovered "some" evidence, yet declined to note where in the record that evidence resides? Where in the record is the testimony that now rebuts what the Court of Appeals declared in April 2001 to be the Sheriffs "unrebutted" testimony that there was no race-based disparate discipline of deputies? The failure of the Court of Appeals to note where the evidence emerged is an impermissible departure from "accepted...judicial proceedings."

CONCLUSION

The Court of Appeals has expanded the scope of race-based employment discrimination claims beyond the perimeters set by the jurisprudence of this Court; moreover, the panel rehearing decision of the Court of Appeals impermissibly represents an unwarranted departure from accepted judicial procedure and is crafted to frustrate further review. For the reasons above, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-30179

Filed APR 05 2001

CECIL MCKENZIE,
Plaintiff-Appellee,

VERSUS

HARRY LEE, Etc; ET AL.,
Defendants,

HARRY LEE, Sheriff, individually and in his capacity as Sheriff of the Jefferson Parish Sheriff's Office,
Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana

Before JONES and DeMOSS, Circuit Judges, and BARZILAY*, Judge.

BARZILAY, Judge:

*Judge, U.S. Court of International Trade, sitting by designation.

Jefferson Parish Louisiana Sheriff Harry Lee ("Sheriff") appeals from the final judgment on jury verdict entered by the district court, Judge Edith Clement presiding. The district court granted judgment in favor of Cecil McKenzie ("McKenzie") on his claims against the Sheriff for employment discrimination. For the reasons discussed below, we REVERSE the judgment of the district court.

I. Background

The trial record reflects the following facts. Sheriff Lee fired McKenzie, a Caucasian deputy, on May 12, 1994 after ten years of service for allegedly using excessive force during the arrest of a young African-American car-jacking suspect. The facts giving rise to McKenzie's termination are as follows. In the pre-dawn hours of April 13, 1994, McKenzie and several other deputies responded to an alleged car-jacking incident wherein a woman was beaten and her car stolen. A high speed chase ensued and ended with the officers cornering the suspects. As two suspects exited their car, a shot was fired, hitting one suspect in the leg. The suspect tumbled to the ground after being hit. McKenzie ran up to the suspect as he lay on the ground, then struck the suspect with his flashlight, handcuffed him, and rolled him onto his back. McKenzie's supervisor saw McKenzie hit the suspect and ran over to the scene. McKenzie continued to shout at the suspect and his supervisor yelled at McKenzie to back off. She advised McKenzie that she would file a disciplinary report against him for his excessive behavior. Nonetheless, McKenzie was allowed to accompany the suspect in the ambulance.

The supervisor filed her report and recommended that McKenzie be suspended for two days. Two officers in the department chain of command approved of her recommendation. Faced with this recommendation as well as a recommendation by one officer following a criminal battery investigation that McKenzie should be terminated, Sheriff Lee chose to terminate McKenzie for his use of "excessive force." The Sheriff called a news conference to announce McKenzie's termination.

In April 1995, McKenzie filed suit against Sheriff Lee in federal district court, alleging unlawful employment discrimination based on race in violation of Louisiana Revised Statutes 23:1006 and 51:2232, 42 U.S.C. §§ 1981 and 1983, and the Fourteenth Amendment of the United States Constitution.[1] The first trial ended in a mistrial based on abuse of peremptory challenges by McKenzie's counsel during jury selection. The case was reassigned to Judge Clement and tried before a second jury, which could not reach a verdict. The third trial also took place before Judge Clement and resulted in the challenged verdict of $64,000 in damages plus prejudgment interest.

McKenzie claimed that the Sheriff wrongfully terminated him on account of his race in order to gain favor with minority constituents. He alleged that the Sheriff's stated reason for terminating him was a pretext for race discrimination and complained that the Sheriff was responding to the political climate following the incident, which

[1] Section 4 of Acts 1997, No. 1409, § 1, repealed L.R.S. 23:1006-23:1008 and consolidated the employment discrimination provisions of law into one chapter. The relevant provisions are now contained in L.R.S. 23:332.

included pressure from African-American citizens regarding police brutality. He claimed that the timing of his termination was suspect, as the Sheriff announced his candidacy for governor of Louisiana shortly afterward. McKenzie asserted that had he not been Caucasian, his supervisors' disciplinary recommendation for suspension would have been followed, and that he was fired only to show voters that Sheriff Lee was willing to respond to their concerns about police brutality by white officers against African-Americans.

Sheriff Lee conceded that some African-American citizens had led an outcry against his office concerning a perceived lack of concern for the safety of African-Americans. The Sheriff argued, however, that he did not fire McKenzie specifically in response to concerns regarding brutality against African-American citizens. Moreover, even if the Sheriff had fired the deputy for that purpose, the termination did not amount to discrimination against McKenzie because he is white. Under the Sheriff's theory, he would have terminated abusers of African-Americans irrespective of the abusers' race.

Following the jury verdict finding in favor of the plaintiff, Sheriff Lee filed a motion to alter or amend the judgment pursuant to Rule 59(e), which the district court denied. The Sheriff timely appealed, claiming that there was insufficient evidence to support the jury's finding that he discriminated against McKenzie because of his race.

II. Discussion

A. Standard of review

The first issue to be resolved on appeal is the standard of review under which the panel will consider this appeal, which depends on whether the defendant moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 at the trial in the district court. Rule 50 states in pertinent part:

> (a) Judgment as a Matter of Law.
>
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to fmd for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

The rule serves two purposes: (1) to permit the trial court to re-examine sufficiency of the evidence and (2) to notify opposing counsel of the insufficiency of his case. *See MacArthur v. University of Texas Health Center at Tyler,* 45 F.3d 890, 897 (5th Cir. 1995).

If the defendant properly moved for judgment as a matter of law at the conclusion of all evidence, the standard for evaluating the sufficiency of the evidence is whether the evidence, considered in the light most favorable to the verdict, has such quality and weight that reasonable and fair-minded persons could reach the same conclusion. *See Polanco v. City of Austin,* 78 F.3d 968, 974 (5th Cir. 1996). Where the purposes of Rule 50 are satisfied, failure to meet the technical requirements of Rule *50* will be excused. However, if a party fails to move for judgment as a matter of law at the close of all evidence or at any other time during the trial, the issue is treated as raised for the first time on appeal and is reviewed under the plain error standard. *See id.* Under the plain error standard of review, the court reviews only whether the plaintiff has presented any evidence in support of his claim; if there is any evidence to support the jury verdict, the appeal will be denied.

The Sheriff did not explicitly make a motion for judgment as a matter of law at the close of all evidence at trial. He argues, however, that by implication he reserved his right to do so, and thus complied with the "spirit" of the rule requiring that he so move to avoid plain error review. Some evidence exists that the trial court was aware of the fact that the Sheriff's counsel was preserving his challenge to sufficiency at the close of the plaintiff's case. However, we need not decide whether the Sheriff preserved the issue of sufficiency to avoid plain error review, because a careful review of the trial record demonstrates that no evidence at all was presented to support the jury's finding that McKenzie was terminated on account of his race. Therefore, even under the plain error standard of review,

the jury verdict must be overturned.

B. Insufficiency of evidence to support the jury verdict

"The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was a victim of intentional discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 143, 120 S.Ct. 2097, 2111 147 L. Ed. 2d 105, 123 (2000). This Court has held that "[c]laims of racial discrimination brought under § 1981 are governed by the same evidentiary framework applicable to claims of employment discrimination brought under Title VII." *LaPierre v. Benson Nissan, Inc.,* 86 F.3d 444, 448 n. 2 (5th Cir. 1996) (citations omitted). The Supreme Court recently addressed the appropriate standards for evaluating employment discrimination claims in *Reeves.* As established in *McDonnell Douglas Corp. v. Green,* 411 U. S. 792, 802, 93 S.Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973), the plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, 411 U.S. at 802, 93 S.Ct. at 1824. Finally, if the employer gives a legitimate, non-discriminatory reason for the action, "the plaintiff must then prove, by a preponderance of the evidence, that the proffered reason was mere pretext for the discrimination." *Byers v. Dallas Morning News,* 209 F.3d 419, 425-26 (2000) (citations omitted).

Plaintiff is correct that he need not address whether a prima facie case has been made before this Court, as the pertinent inquiry on appeal after a verdict is whether the

plaintiff has proven discrimination, not whether a prima facie case has been made. *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1110 (5th Cir. 1995). Under the plain error standard of review, the appellate court reviews only whether the plaintiff has "presented *any* evidence in support of his claim." *Polanco v. City of Austin, Texas,* 78 F.3d 968, 974 (5th Cir 1996) (emphasis added) (citations omitted). Hence, we review only whether McKenzie has presented any evidence showing that he received disparate treatment because of his race, and that the proffered nondiscriminatory reason for his treatment was a pretext for racial discrimination. McKenzie correctly notes that this court will adhere to its longstanding rule that reversal for plain error is an extreme remedy and will occur only to avoid a miscarriage ofjustice. *See Rizzo v. Childrens' World Learning Center, Inc.* 213 F.3d 209, 213 (5th Cir. 2000). We believe that in order to avoid such a miscarriage of justice, the jury verdict in this case must be reversed for plain error.

McKenzie offered several evidentiary points in support of his claims that he was terminated because he is white and that Sheriff Lee's stated reason for his termination, excessive force, was a pretext for race discrimination. First, McKenzie noted that Sheriff Lee, who had recently undertaken a gubernatorial campaign, was aware of two prior instances of brutality against young African-Americans, and was under pressure from African-American constituents to crack down on brutality against minorities. Second, McKenzie established that Sheriff Lee was aware of other officers who had participated in severe abuses of minority suspects and inmates, but who were given only short suspensions for their behavior. Additionally,

McKenzie produced evidence that his three supervisors recommended that he receive a two-day suspension. His supervisor who was the reporting officer on the scene testified that she was surprised to discover that McKenzie had been fired over the incident; another officer testified that McKenzie's conduct did not warrant termination.

With the evidence presented, McKenzie has clearly established that he was harshly punished for his behavior, and that he was punished more harshly than other officers who had used force at least as excessive as McKenzie had in his work as a deputy. What McKenzie has failed to produce is any evidence indicating that he was punished more harshly and that he received disparate treatment *because of his race.* There is no indication that the other officers who were disciplined less severely are non-Caucasians. Indeed, it is entirely possible that the comparable officers who engaged in more egregious behavior were also white, a fact which would preclude their use as comparables to show disparate treatment of similarly situated individuals who were not members of McKenzie's protected class. *See Williams v. Trader Publishing* Co., 218 F.3d 481, 484 (5th Cir. 2000) ("To prove discrimination, a plaintiff may use circumstantial evidence that [s]he has been treated differently than similarly situated non-members of the protected class.") (citations omitted). While the punishment the other officers received supports a contention that the disciplinary action taken against McKenzie was more severe, it does not show that his punishment was more severe simply because he was white. Sheriff Lee even provided unrebutted testimony that he fired numerous black and white officers for disciplinary violations, including the use of excessive force.

Likewise, the statements from his supervisors establish at most that McKenzie was punished harshly, but do nothing to support McKenzie's claim that he was punished more harshly because of his race. Plaintiff himself provides as support for his claim of racial discrimination that there were rumors in the sheriff's office that someone in the department needed to be "sacrificed" to appease the community's black citizenry. This statement can only support the contention that McKenzie was punished because of the race of his victim, rather than his own Caucasian ethnicity.

McKenzie's burden was to establish that he was terminated on account of his race. *Byers,* 209 F.3d at 425-26. He cannot prevail by merely showing that he was punished severely, that he was punished more severely than other officers, or that he was punished because of the Sheriff's desire to gain favor in the black community. The Court does not deny that termination is a harsh punishment, and that McKenzie's evidence showed that it may not have been entirely warranted in these circumstances. However, unwarranted termination alone cannot support a claim of racial discrimination. *See id.* at 425 (noting that an employer's decision to terminate an employee violates the statute "when that decision was based on race, whether that race be white or black.") (citations omitted). While the race of the victim of McKenzie's brutality may have factored into the Sheriff's decision, it is the issue of whether McKenzie's race was a motivating factor that drives the determination of unlawful employment discrimination on account of race. *See Harrington v. Harris,* 118 F.3d 359, 367-68 (5th Cir. 1997) (holding that a plaintiff may establish pretext by showing that the employer was motivated by a discrimina-

tory motive.) (citations omitted). With no evidence that he was terminated due to his race, and no evidence that the proffered nondiscriminatory reason for his termination was merely a pretext for racial discrimination, McKenzie's claim fails.

III. Conclusion

Based upon the foregoing, we hold that the district court erred in finding sufficient evidence of racial discrimination. The trial court's judgment based on the jury verdict is therefore REVERSED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30179

F I L E D JUL 20 2001

CECIL MCKENZIE

Plaintiff - Appellee

v.

HARRY LEE, Etc; ET AL

Defendants

HARRY LEE, Sheriff , individually and in his capacity as Sheriff of the Jefferson Parish Sheriff's Office

Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REMARING EN-BANC

(opinion 4/5/01, 5 Cir.,_____. _____F. 3d_____)

Before JONES and DeMOSS, Circuit Judges, and BARZILAY*, Judge.

*Judge, U.S. Court of International Trade, sitting by designation.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is GRANTED, and the attached opinion is substituted therefor.

ENTERED FOR THE COURT:

/S/ Edith Jones
United States Circuit Judge

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-30179

FILED JUL 2 0 2001

CECIL MCKENZIE,
Plaintiff-Appellee,

VERSUS

HARRY LEE, Etc; ET AL.,
Defendants,

HARRY LEE, Sheriff, individually and in his capacity as Sheriff of the Jefferson Parish Sheriff's Office,
Defendant-Appellant

Appeal from the United States District Court
For the Eastern District of Louisiana

Before JONES and DeMOSS, Circuit Judges, and BARZILAY[1] Judge.

PER CURIAM:

Upon reconsideration, we withdraw our previous opinion in this matter, reported at 246 F. 3d 494, and substitute the following.

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[1] Judge of the U. S. Court of International Trade, sitting by designation.

Jefferson Parish Louisiana Sheriff Harry Lee ("Sheriff") appeals from the final judgment on jury verdict entered by the district court, Judge Edith Clement presiding. The district court granted judgment in favor of Cecil McKenzie ("McKenzie") on his claims against the Sheriff for employment discrimination. Following the jury verdict finding in favor of the plaintiff, Sheriff Lee filed a motion to alter or amend the judgment pursuant to Rule 59(e), which the district court denied. The Sheriff now claims that there was insufficient evidence to support the jury's finding that he discriminated against McKenzie because of his race.

If the defendant properly moved far judgment as a matter of law at the conclusion of all evidence pursuant to Rule 50, or departed from the technical requirements of the rule but satisfied its purposes, the standard on appeal for evaluating the sufficiency of the evidence is whether the evidence, considered in the light most favorable to the verdict, has such quality and weight that reasonable and fair-minded persons could reach the same conclusion. *See Polanco v. City of Austin, 78* F.3d 968, 974 (5th Cir. 1996). The Sheriff did not make a motion for judgment as a matter of law at the close of all evidence, and his departure from the rule was significant. While the court will not "'demand a slavish adherence to the procedural sequence and...require these defendants... to articulate the words of renewal once the motion had been taken under advisement,' . . . this circuit has never completely disregarded the requirement that the defendant must move for judgment as a matter of law at the close of all evidence." *Id* at 974 (quoting *Bohrer v. Hanes* Corp., 715 F. 2d 213,217 (5th Cir. 1983). Thus, we review the jury verdict under the plain error standard,

examining only whether the plaintiff has "presented *any* evidence in support of his claim." *Id.* (emphasis added) (citations omitted).

In an employment discrimination case, the plaintiff must show that he received disparate treatment because of his race, and that the proffered nondiscriminatory reason for his treatment was a pretext for racial discrimination. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d. 668, 677 (1973). McKenzie has presented some, albeit minimal, evidence of treatment different ftom similarly situated non-members of his protected class. *See Williams v. Trader Pub. Co.,* 218 F. 3d 481, 484 (5th Cir. 2000) (holding that such circumstantial evidence may be used to prove discrimination). He has therefore met the plain error requirement of presenting *any* evidence supporting his claim. This court will adhere to its longstanding rule that reversal for plain error is an extreme remedy and will occur only to avoid a miscarriage of justice. *See Rizzo v. Childrens' World Learning Center, Inc.* 213 F.3d 209, 213 (5th Cir. 2000). The judgment appealed is therefore AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30179

FILED AUG 15 2001

CECIL MCKENZIE

Plaintiff - Appellee

v.

HARRY LEE, Etc; ET AL

Defendants

HARRY LEE, Sheriff , individually and in his capacity as Sheriff of the Jefferson Parisph Sheriff's Office

Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

(opinion 4/5/01, 5 Cir.,____. ____F. 3d____)

Before JONES and DeMOSS, Circuit Judges, and BARZILAY*

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* Judge of the U. S. Court of International Trade, sitting by designation.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition or Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition fcr Rehearing En Banc as a Petitition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge